Omni Innovations LLC v. Insurance Only Inc et al Doc. 22

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington Limited Liability company, Plaintiff, v. INSURANCE ONLY, INC.; MICHAEL WEDEKING, and his marital community; PATRICK WEDEKING, and his marital community, Defendants.	NO. CV06-1210TSZ **DECLARATION OF LARRY G. JOHNSON IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR INJUNCTIVE RELIEF**

I, Larry G. Johnson, declare as follows:

1. I am over the age of 18 and competent to testify as a witness in this matter. I make the following declaration based on personal knowledge, and on

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
TELEPHONE: (509) 783-6154

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belief and expertise developed over many years as an expert in computer forensics and electronic discovery.

2. I am President of e-DataEvidence, a company providing full-services e-discovery consulting and file processing of computer generated data for law firms and corporate counsel, with particular emphasis on e-mails, using best-practices protocols and analytics for distilling relevant digital evidence for use in litigation. Previously, from 2002 to January of 2006, I was the President of Legal Technology Group, Inc., a digital data and electronic discovery consulting firm with offices in Washington and Oregon, and I am a former (2000-2002) Director of Electronic Discovery Services for Fios, Inc., of Portland, Oregon, a company specializing in electronic discovery, digital data processing, computer forensics and analysis. Prior to that, from 1998 to 2000, I worked as a consultant and Case Manager for Computer Forensics, Inc., in Seattle, Washington.

3. I have used personal computers extensively since they were first commercially available in the early 1980s and have substantial experience in the use and analysis of the Microsoft Office suite of applications (Word, Excel, Access, Outlook and PowerPoint) and the Microsoft Windows operating system

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
TELEPHONE: (509) 783-6154

in its various versions. For the past 19 years, I have consulted lawyers regarding the use of computers in litigation, and I have also practiced law as a litigator, having been admitted to the Washington State Bar in 1974, of which I am a member in good standing.

4. For the past nine years I have specialized in the areas of electronic discovery and computer forensics. Over the course of a year, I was formally trained in computer forensics techniques and software by Computer Forensics, Inc. in Seattle, Washington, and I have been trained and certified by New Technologies, Inc. (NTI) of Gresham, Oregon, in the recovery and analysis of digital data and the use of computer forensics tools. I have served as the Chairman of the Technology and Law Section of the King County Bar Association (Seattle) and have written extensively on computers and digital data discovery issues in *The ABA Journal* and numerous other publications. I have also been a frequent speaker at CLE presentations throughout the United States, discussing the use of computers in discovery and litigation. I am co-author with Tom Howe of a three-volume reference work entitled *Electronic Discovery Technologies, Practical Tips and Tools*, to be published by Law Forum Press in

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
TELEPHONE: (509) 783-6154

Q3 of 2007. I am a graduate of the University of Minnesota (B.A. *summa cum laude*, J.D. *cum laude*) and Harvard University (M.A.).

5. I have read Omni Innovations, LLC's ("Omni") Motion for Partial Summary Judgment and the Declaration of James S. Gordon, Jr., offered in support of that motion. I have been retained by the law firm of Rettig, Osborne, Forgette, O'Donnell, Iller & Adamson, LLP to provide my analysis and expert opinions regarding not only that motion and declaration, but also the copies of e-mails Omni produced to the Defendants in the course of discovery, and upon which Omni bases its case.

6. By way of background information, an "e-mail" is a message, usually consisting of text, sent via computer from one person to another at an e-mail address. A "domain" in the context of e-mails is the name that appears to the right of the @ sign in an Internet address. Thus, for example, "james@gordonworks.com" is an e-mail address, whereas "gordonworks.com" is the domain that hosts that e-mail account and others. A domain is not the "destination" of a sent e-mail, but simply a repository of destinations, i.e. e-mail accounts, from or to which e-mails are sent.

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6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
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7. A review of publicly available records reveals that Omni is not the owner of at least eight of the 11 domains for which it seeks a permanent injunction. Specifically, only gordonworks.com and itdidnotendright.com are owned by Omni Innovations, LLC. Rcw19190020.com might be owned by Omni Innovations, LLC, because a similar name is shown for the owner. The remaining eight domains for which Omni seeks an injunction, however, are all owned not by Omni, but by individuals who appear likely to be friends or family members of James Gordon.

8. I received and reviewed a CD from the law firm of Rettig, Osborne, Forgette, O'Donnell, Iller & Adamson, LLP, that contains six files, only two of which have data: "Insuranceonly - Omni.mbx" and "Insuranceonly.mbx."[1] I was informed by counsel that the CD they provided me is an exact copy of the CD produced by Omni in the course of discovery, which CD allegedly contains e-mails that Omni claims were sent by Insurance Only or procured by Insurance Only.

9. These two files of alleged e-mails, "Insuranceonly - Omni.mbx" and "Insuranceonly.mbx," are in a text format that can be read not only by a

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[1] The four other files are "in.mbx," "out.mbx," "junk.mbx" and "trash.mbx," each of which consisted of 0 kilobytes.

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
TELEPHONE: (509) 783-6154

software application called Eudora, but by any word processing software as well. These two files do *not* contain the original e-mails from the e-mail mailboxes of the 52 individual users who own those e-mail accounts. Rather, someone has specially and artificially created these two Eudora-like files by either extracting e-mail information from the 52 users' e-mail accounts and exporting them to these specially manufactured files, or by appending them in a word processor.

10. The two Eudora-like files that somebody has created and extraordinarily named as "Insuranceonly - Omni.mbx" and "Insuranceonly.mbx" are not in fact the usually expected exported file names in a normal export of Eudora e-mails from a user's mailbox, i.e., the e-mail "in.mbx," "out.mbx," "junk.mbx" and "trash.mbx" files as found in the mailbox of a typical user. Instead, among the files on the CD produced by Omni, whatever had been in those four usual folders of e-mails for 52 separate mailboxes was removed (or never existed in the first place), showing 0 bytes for the in, out, junk and trash e-mail folders in a directory listing. There is no way of knowing whether the complained-of e-mails were in fact from a given mailbox

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
TELEPHONE: (509) 783-6154

owner's "out" folder of sent or forwarded e-mails from him or her; from the "junk" or "trash" folders where the e-mails could have been automatically routed rather than ever received by the mailbox owner in the "in" folder, or from the "in" folder of actually received e-mails.

11. None of the alleged e-mails in this collection are original e-mails but are, at best, partial artifacts of original e-mails. Based on my review of the e-mails on the CD and those attached to the Gordon Declaration, and my extensive experience in computer forensics, I find no factual basis of any kind upon which to conclude that these e-mails were sent by Insurance Only, nor do I discern in Omni's motion and supporting declaration of Mr. Gordon any facts or analysis to demonstrate that the e-mails were sent by any person or entity that is in some way linked to Insurance Only. On the other hand, my review and analysis do lead me to conclude with a high degree of certainty that the proffered e-mails were not sent by Insurance Only.

12. There are 4,186 alleged e-mails on the CD. As indicated above, the alleged e-mails on the CD, to the extent they reflect what might have been original e-mails, have been removed from what appear to be 52 original mailbox

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
TELEPHONE: (509) 783-6154

environments and, at a minimum, text has been added to them in obvious ways that constitute alterations of what one would expect to see in original e-mail content. There are numerous instances where the text alterations or missing original content are obvious.

13. For example, at least 125 of them in their original form had file attachments; none of the 4,186 alleged e-mails produced in the specially created "Insuranceonly - Omni.mbx" and "Insuranceonly.mbx" files kept those attachments. Further, based on a sampling of these alleged e-mails, over 40% of the 4,186 alleged e-mails are missing message content, consisting of text and/or graphics. In other words, approximately 40% of these e-mails are blank. Instead, most of these "phantom" e-mails have graphics placeholders to show were original message content would have once been. By removing the alleged 4,186 e-mails from their original mailbox containers of 52 users to create the two specially created "Insuranceonly - Omni.mbx" and "Insuranceonly.mbx" files, original e-mail message contents, or the links to the message content, were lost for 40% of the e-mails. They cannot be reconstructed on the basis of the CD provided to Defendants by Omni.

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
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14. These two .mbx files are thus truncated versions of original files, to the extent those can be said to exist. In addition, of the alleged 4,186 e-mails alleged to have been "sent" directly to Omni's users by Defendants, 575 of them are in fact e-mails that were *attachments* to e-mails sent by Omni to itself, i.e. e-mails created automatically by anti-spam software installed by Omni on its own server, warning the owner of that server that the *attached* intercepted e-mails might be spam and, if so, steps could be taken to block others like it (steps Omni did not take).

15. These 575 alleged e-mails also had the original subject lines altered so that in each instance the subject line begins with "*****SPAM*****," hardly something a spammer would do, whether the possible spam e-mail is legal or fits a definition that makes it illegal.

16. Finally, the same anti-spam software installed by OMNI on its server, called "SpamAssassin," added its own "header" text (the "header" contains embedded text in an e-mail that purports to show its transmission history, but it is easily forged or altered). This added text from SpamAssassin would not have been in the 4,186 alleged e-mails in their original configuration. In this case, the SpamAssassin software populated the header with lines that

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
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begin with “X-Spam” followed by a text with analysis that the software inserts. Ironically, of the 4,186 purported e-mails, the software labeled 3,103 as "X-Spam-Status: No," i.e., “not spam,” and 578 as “possible spam.” It was silent about the remaining 505 purported e-mails.

17. The “Insuranceonly - Omni.mbx” and “Insuranceonly.mbx” files are in fact compilations created from the e-mails of 52 unique e-mail recipients’ mailboxes. And while the “Insuranceonly - Omni.mbx” and “Insuranceonly.mbx” files can be read in the Eudora e-mail application, based on my experience, it is highly unlikely that the 52 unique e-mail accounts apparent in those two specially created Eudora-like files had a Eudora origin. It is much more likely that these two files include e-mail text from e-mails generated in other, more popular and widely-used e-mail applications, such as Microsoft Exchange/Outlook, Yahoo Mail, MSN Hotmail or Google GMail. In moving the e-mails from other applications to these specially created Eudora files, the original metadata associated with the actual e-mail box owners was lost or altered, and are thus incomplete and unreliable evidence.

18. Other e-mails produced by Omni reveal text variations in the subject line where uniformity of text would be expected, especially if sent by

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6725 W. CLEARWATER AVENUE
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TELEPHONE: (509) 783-6154

spammers mailing in bulk. Examples of such an oddity, suggestive of text tampering or edits in a word processor, are the following:

E-mail	Date (UTC)	From	Subject	To
Click to view	2006/09/27 16:15	Humanacros	What Happens to Family Without Medical Coverage?	temon@jaycelia.com
Click to view	2006/10/13 23:01	Bluecare	What Happens to Your Family Without Medical Coverage?	faye@gordonworks.com
Click to view	2006/10/10 20:16	Simple Quote	What Happens to Your Family Without Medical Coverage	jay@gordonworks.com

19. Based on the foregoing, not only are the 4,186 proffered e-mails not original e-mails, they are not even complete. Based on the evidence supplied by Omni and in my professional opinion, none of the 4,186 alleged e-mails produced by Omni to Defendants was sent by the Defendants.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

SIGNED at Newcastle, Washington, on this 3rd day of July, 2007.

LARRY G. JOHNSON

RETTIG OSBORNE FORGETTE, LLP
6725 W. CLEARWATER AVENUE
KENNEWICK, WASHINGTON 99336
TELEPHONE: (509) 783-6154

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Robert J. Siegel, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: N/A.

s/ Cheryl R.G. Adamson / WSBA #19799
Attorney for Defendants
RETTIG OSBORNE FORGETTE, LLP
6725 W. Clearwater Avenue
Kennewick, WA 99336
Phone: (509) 783-6154
Fax: (509) 783-0858
E-mail: cheryl.adamson@rettiglaw.com